No. 87-1504

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD O. LOENGARD, JR., JOHN BORG LOENGARD and URSULA L. BERENS, individually and as Executors of the ESTATE OF MARGERY BORG LOENGARD, Deceased; THE BANK OF NEW YORK, Trustee of the Trust for the Benefit of DOROTHY BORG under the Will of SIDNEY C. BORG, Deceased; FRANCES M. BORG, DONALD C. BORG and WILLIAM FURTH as Executors of the ESTATE OF JOHN S. BORG, Deceased; and SYLVIA T. YARROW,

Petitioners,

—v.—

SANTA FE INDUSTRIES, INC., SANTA FE NATURAL RESOURCES, and KIRBY LUMBER CORPORATION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Was the petition for certiorari timely filed, under 28 U.S.C. § 2101(c), where petitioners obtained an extension of their time to file under Rule 20.6 of the Rules of this Court, upon the representation that new counsel needed time to study the record, whereas in fact the petition was subsequently filed by the same law firm, and the same individual counsel of record, who have represented petitioners throughout this litigation?

2. Is the purported "due process" issue properly before this Court for review, where it was never raised in the District Court or the Court of Appeals?

3. Do petitioners herein have standing to argue that the Delaware appraisal proceeding relating to the subject merger denied due process to minority stockholders, where petitioners had made a conscious choice not to participate in that proceeding, and were not parties thereto?

4. Where the actual substance of petitioners' contention is that the courts in the Delaware appraisal proceeding applied an incorrect valuation formula and erroneously placed too low a valuation on the minority shares, does such a contention raise any genuine issue of due process, meriting review by this Court, under the Fifth and Fourteenth Amendments to the Constitution?

5. Where the United States Court of Appeals in the present action undertook to apply the law of Delaware, which all parties agreed was applicable in this diversity case, and sought by interpreting the most recent decisions of the Delaware Supreme Court to determine how that court would have decided this case, does petitioners' contention that the Second Circuit erred in its interpretation of the Delaware decisions raise any genuine issue for review by this Court under *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938)?

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IN THE

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No. 87-1504

RICHARD O. LOENGARD, JR., JOHN BORG LOENGARD and URSULA L. BERENS, individually and as Executors of the ESTATE OF MARGERY BORG LOENGARD, Deceased; THE BANK OF NEW YORK, Trustee of the Trust for the Benefit of DOROTHY BORG under the Will of SIDNEY C. BORG, Deceased; FRANCES M. BORG, DONALD C. BORG and WILLIAM FURTH as Executors of the ESTATE OF JOHN S. BORG, Deceased; and SYLVIA T. YARROW,

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SANTA FE INDUSTRIES, INC., SANTA FE NATURAL RESOURCES, and KIRBY LUMBER CORPORATION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondents, Santa Fe Industries, Inc., Santa Fe Natural Resources, Inc., and Kirby Forest Industries, Inc., formerly known and designated herein as Kirby Lumber Corporation,[1]

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1 Pursuant to Rule 28.1 of the Rules of this Court, Respondents state that the ultimate parent of each of them is Santa Fe Southern Pacific

respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision by the Court of Appeals for the Second Circuit in this case. Respondents further request, in view of the frivolous nature of this petition, that appropriate damages be awarded pursuant to Rule 49.2 of the Rules of this Court.

This "multi-volume litigation," as the Second Circuit characterized it (certification order, *Loengard* v. *Santa Fe Indus., Inc.*, No. 86-7682 at 1 (2d Cir. Nov. 12, 1987)), has now dragged on in the federal and state courts for almost 14 years. The purported constitutional issues which are urged in the present petition for certiorari were never raised in the District Court or in the Court of Appeals, and are a transparent sham. There is no real basis for the filing of the petition, other than petitioners' dissatisfaction with the result below, and their unwillingness to see this litigation finally come to an end.

This is the third time that the present controversy, a valuation dispute concerning a 1974 Delaware corporate merger, has been before this Court. It is the second time that this Court has been asked to review the identical underlying issues of Delaware law, which are the only issues remaining in this diversity action. *See Green* v. *Santa Fe Indus., Inc.*, 576 F. Supp. 269 (S.D.N.Y. 1983), *aff'd mem.*, 742 F.2d 1434 (2d Cir.), *cert. denied*, 469 U.S. 917 (1984). Petitioners' position as to the state law issues involved has now been rejected by two separate panels of the Second Circuit, and by the New York Court of Appeals. A total of 17 appellate judges (including the intermediate appellate court of New York) have now considered the state law claims urged by petitioners, and none has found any merit in petitioners' position. It is under these circumstances that petitioners

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Corporation, except that on or about December 22, 1986 all the outstanding stock of Kirby Forest Industries, Inc. was acquired by Louisiana-Pacific Corporation, pursuant to a share purchase agreement by the terms of which all rights, liabilities and obligations, if any, arising from the present litigation were retained by respondent Santa Fe Industries, Inc. Respondents have no subsidiaries which are publicly traded.

now assert, for the first time, that the result below constitutes a denial of "due process of law."

The 1974 Delaware short-form corporate merger which is the subject of this litigation is extensively described in this Court's opinion in *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462 (1977). As the Court there noted, *id.* at 465-66, Delaware law provides that "any stockholder who is dissatisfied with the terms of the merger may petition the Delaware Court of Chancery for a decree ordering the surviving corporation to pay him the fair value of his shares, as determined by a court-appointed appraiser subject to review by the court" (citations omitted). As this Court further stated in its 1977 decision, with respect to the Kirby merger:

> On the basis of the information provided, minority shareholders could either accept the price offered or reject it and seek an appraisal in the Delaware Court of Chancery. Their choice was fairly presented, and they were furnished with all relevant information on which to base their decision. (Footnote omitted.)

Id. at 474. A number of the former minority stockholders of Kirby did invoke their statutory right of appraisal, and proceeded to litigate the valuation of the stock in the Delaware courts. *See Bell* v. *Kirby Lumber Corp.*, 395 A.2d 730 (Del. Ch. 1978), *aff'd in part and rev'd in part*, 413 A.2d 137 (Del. 1980). Petitioners herein, however, chose not to participate in the appraisal litigation, and instead accepted the offer of $150 per share in cash.

The prior proceedings in this litigation, which have generated a large number of reported decisions,[2] need not be discussed at

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2 *See, e.g., Green* v. *Santa Fe Indus., Inc.*, 391 F. Supp. 849 (S.D.N.Y. 1975), *aff'd in part and rev'd in part*, 533 F.2d 1283 (2d Cir. 1976), *rev'd*, 430 U.S. 462 (1977); *Green* v. *Santa Fe Indus., Inc.*, 562 F.2d 4 (2d Cir. 1977); *Green* v. *Santa Fe Indus., Inc.*, 82 F.R.D. 688 (S.D.N.Y. 1979); *Green* v. *Santa Fe Indus., Inc.*, 88 F.R.D. 575

length herein. However, it should be pointed out that petitioners' characterization of certain of the proceedings below is disingenuous and seriously misleading. Thus, petitioners assert (Petition, p. 11) that the Second Circuit twice made "statements that the transaction at issue operated as a fraud on the minority." This statement is simply untrue.

First, petitioners assert (Petition, p. 12) that the Second Circuit reached such a "conclusion of fraud" in its first panel decision in *Green*, 533 F.2d 1283, which was subsequently reversed by this Court. However, the Second Circuit in that decision expressly pointed out that it was *not* making any factual determination as to whether a fraud had actually occurred. ("We also recognize that we are only dealing now with the allegations of the complaint, which we must assume to be true.") *Id.* at 1287 The case was then before the Second Circuit on appeal from a dismissal under Fed. R. Civ. P. 12, and the only issue was whether the allegations of the complaint stated a "cognizable" claim of fraud under the federal securities laws (an issue which was subsequently resolved, adversely to plaintiffs' position, by this Court's decision in *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462).

The other "statement" cited by petitioners (Petition, p. 12) is the Second Circuit's order certifying to the New York Court of Appeals the question of whether petitioners' complaint stated a claim for relief under N.Y. Gen. Bus. Law § 352(c) (McKinney 1984), commonly known as the Martin Act. Thus, in this instance also, the only question before the Court was whether the allegations of the complaint stated a "cognizable" claim. Indeed, the Second Circuit expressly repudiated any claim that its certification order constituted a holding on the issue of fraud:

(S.D.N.Y. 1980); *Green* v. *Santa Fe Indus., Inc.*, 576 F. Supp. 269 (S.D.N.Y. 1983), *aff'd mem.*, 742 F.2d 1434 (2d Cir.), *cert. denied*, 469 U.S. 917 (1984); *Green & Borg* v. *Santa Fe Indus., Inc.*, 70 N.Y.2d 244 (1987); *Loengard* v. *Santa Fe Indus., Inc.*, 70 N.Y.2d 262 (1987); *Loengard* v. *Santa Fe Indus., Inc.*, 573 F. Supp. 1355 (S.D.N.Y. 1983); *Loengard* v. *Santa Fe Indus., Inc.*, 639 F. Supp. 673 (S.D.N.Y. 1986), *dismissed mem.*, 812 F.2d 712 (2d Cir. 1987).

> In support of his motion Loengard claims that our January 28 order held that the defendants' acts were fraudulent and that the defendants are collaterally estopped from challenging the value of the assets and stock in question. [citation omitted]. *This is an incorrect and disingenuous reading of that order.* [Emphasis supplied.]

Loengard v. *Santa Fe Indus., Inc.*, No. 86-7682 at 3 (2d Cir. Nov. 12, 1987).

Despite this explicit statement by the Court of Appeals, petitioners have included the same "incorrect and disingenuous" representation in their statement of facts. We respectfully suggest that this conduct should be considered in connection with respondents' request for sanctions.

SUMMARY OF ARGUMENT

1. The petition is untimely, and therefore jurisdictionally defective. Petitioners obtained an extension of time to file upon the representation that new counsel needed time to study the record, but in fact no new counsel appears on the petition.

2. The petition should be denied for the further reason that the purported Constitutional issue was never raised in the District Court or in the Court of Appeals.

3. Because petitioners elected not to participate in the Delaware appraisal proceedings, they have no standing to raise any alleged Constitutional defect in the conduct of those proceedings.

4. There is no basis for any contention that the Delaware merger and appraisal statutes, either on their face or as applied by the Delaware courts, violate the due process clauses of the Fifth and Fourteenth Amendments. Delaware law provides minority stockholders with a full opportunity to litigate the fair value of their stock, and requires that they be fairly compensated. Petitioners' factual disagreements with the findings of the Delaware courts, as to this particular merger, do not raise any genuine due process issue.

5. All parties to this diversity action agreed with the courts below that Delaware law applied to the substantive issues. Petitioners do not dispute that the Second Circuit sought, by interpreting the most recent decisions of the Delaware Supreme Court, to determine how that court would have decided the present case. Petitioners' contention that the Second Circuit erred in construing the Delaware decisions does not raise any issue which merits review by this Court under *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938).

ARGUMENT

1. The Petition Should be Denied as Untimely

Under 28 U.S.C. § 2101(c), petitioners were obliged to apply for certiorari within 90 days of the order of the Second Circuit, entered on November 12, 1987. This requirement is jurisdictional. *See, e.g., Deal* v. *Cincinnati Bd. of Educ.*, 402 U.S. 962 (1971); *Teague* v. *Commissioner of Customs*, 394 U.S. 977 (1969); R. Stern and E. Gressman, *Supreme Court Practice* § 6.1, p. 389 (5th ed. 1978). The statute further provides that the time for applying for a writ of certiorari can be extended by a justice of this Court, "for good cause shown," for a period not exceeding 60 days. Rule 20.6 of the Rules of this Court provides that such an application for extension of time "must set forth with specificity the reasons why the granting of an extension of time is thought justified," and explicitly states that such applications "are not favored."

Throughout this litigation, petitioners have been represented by Sidney Bender, Esq. of the firm of Leventritt, Lewittes & Bender. Petitioners applied to Justice Marshall for an extension of time within which to petition for certiorari, on the basis of a representation that time was needed for new counsel to review the record. In support of this application, petitioners submitted a statement, dated January 29, 1988, by Kathryn A. Oberly, Esq. of Washington, D.C. Ms. Oberly stated therein that she "was retained only yesterday to evaluate this case," and that additional time was therefore required "to enable counsel to

familiarize herself with the extensive record in this litigation and to analyze the legal issues involved." Justice Marshall granted petitioners an extension of time to March 10, 1988.

However, the petition which was subsequently filed on that date was signed only by Mr. Bender and his law firm—the same attorneys who have represented petitioners throughout this litigation. No explanation has been offered by petitioners.

Under these circumstances, respondents submit that the petition should be denied as untimely, and that the conduct of petitioners in this connection should be considered in connection with the imposition of sanctions.

2. The Purported Constitutional Issues Were Never Raised in the Courts Below

During all the years that this case has been in litigation, the argument which petitioners now seek to make under the due process clauses of the Fifth and Fourteenth Amendments was never raised in the District Court or the Court of Appeals. Petitioners' present assertion (Petition, p. 9) that "Delaware law authorizes the seizure of minority shareholders' property interests without adequate compensation" represents the first time that any such contention has been made. This fact, alone, would warrant denial of the petition. *E.g.*, *EEOC* v. *Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *United States* v. *Santana*, 427 U.S. 38, 41 n.2 (1976).[3]

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3 In an apparent attempt to excuse their failure to raise the issue earlier, petitioners assert (Petition, p. 12) that the decision of the Second Circuit constituted "an amazing reversal of position, and a surprise to petitioners." However, as the Second Circuit noted in its opinion (*Loengard* v. *Santa Fe Indus., Inc.*, No. 86-7682 (2d Cir. Nov. 12, 1987)), its decision reached precisely the same result previously reached on the identical claim, pertaining to the same transaction, in *Green* v. *Santa Fe Indus., Inc.*, 576 F. Supp. 269 (S.D.N.Y. 1983), *aff'd*, *mem.*, 742 F.2d 1434 (2d Cir.), *cert. denied*, 469 U.S. 917 (1984), and by the New York Court of Appeals in *Green & Borg* v. *Santa Fe Indus., Inc.*,

In fact, petitioners' belated attempt to raise a constitutional issue is merely a transparent effort to manufacture a basis for review on certiorari, where no genuine basis exists, and it should be summarily rejected.

3. Petitioners Lack Standing to Raise the Purported Constitutional Issues

To the extent that petitioners seek to raise a contitutional challenge to the proceedings of the Delaware courts in the appraisal action, *Bell* v. *Kirby Lumber Corp.*, 395 A.2d 730 (Del. Ch. 1978), *aff'd in part and rev'd in part*, 413 A.2d 137 (Del. 1980), their position is untenable for an additional reason. Petitioners were concededly not parties to the Delaware proceeding, having deliberately elected not to invoke their statutory right of appraisal, but rather to accept the cash payment offered by the surviving corporation. Accordingly, petitioners clearly have no standing to raise any alleged constitutional issue with respect to the conduct of the Delaware proceedings. *See*, *e.g.*, *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972). For this reason, also, the petition should be denied.

4. The Petition Raises No Genuine Issue Under the Due Process Clauses of the Fifth and Fourteenth Amendments

Even if petitioners' due process contentions had been raised in a proper and timely manner, and even if petitioners had standing to assert them, they still would not present any genuine issue for review by this Court. Although it is unclear whether petitioners are contending that the Delaware law is unconstitutional (a) on its face, or (b) only as applied by the Delaware Supreme Court in *Bell* v. *Kirby*, *supra*, in the light of the Second Circuit's holding that it was petitioners' exclusive remedy, it is clear that neither of these contentions would raise a genuine constitutional issue.

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70 N.Y.2d 244, 256-61 (1987). Petitioners' briefs in the Second Circuit discussed these earlier decisions at length and, while urging that they were erroneous, never raised any contention that they violated constitutional requirements of due process.

(a) The Delaware Short Form Merger and Appraisal Statutes Are Not Unconstitutional on Their Face

"It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (citations omitted). In the light of this standard, petitioners have entirely failed to raise any issue as to the facial validity of the Delaware statutes.

The Delaware short-form merger statute (Del. Code Ann. tit. 8 § 253 (1981)), read in conjunction with the appraisal statute (Del. Code Ann. tit. 8 § 262 (1981)), provides a full opportunity for a dissenting stockholder to contest any alleged inadequacy in the compensation offered for his stock. Indeed, petitioners do not appear to allege any lack of procedural due process. Rather, their attack on the statute is based on the assumption (Petition, p. 9) that the Delaware law "authorizes the seizure of minority shareholders' property interests without adequate compensation." Such an interpretation of the statute, however, has been expressly negated by the Delaware Supreme Court, in a decision relating to the very merger involved in this action. In its decision in *Bell*, that Court specifically held that the Delaware appraisal procedure under Section 262 requires "inquiry into fair price within the context of entire fairness", *Bell*, 413 A.2d at 140. The opinion of the Delaware Supreme Court as to the correct interpretation of the Delaware statute is, of course, conclusive. *E.g.*, *Kingsley Int'l Pictures Corp.* v. *Regents of Univ. of N.Y.*, 360 U.S. 684, 688 (1959); *Albertson* v. *Millard*, 345 U.S. 242, 244 (1953).

(b) The Application of the Delaware Appraisal Statute by the Delaware Courts to the Kirby Merger Does Not Raise Any Genuine Issue of Due Process

The real gravamen of petitioners' attack on the Delaware appraisal proceeding is apparently (*see*, *e.g.*, Petition, pp. 9-10) their contention that the Delaware courts acted improperly in considering valuation factors other than asset value, and in finally placing a value on the stock which was less than the per share appraised value of the assets. This contention is untenable on its face. Even assuming *arguendo* that petitioners had standing to raise such an issue and had raised it properly below (*see* Points 2 and 3, *supra*), they have cited no authority for the proposition that constitutional due process requires a state court to apply any particular formula or method of valuation.

The Delaware courts considered at length the appraised value of Kirby's assets, *Bell*, 413 A.2d at 142-45. The courts weighed this information along with other evidence relating to the value of the stock, such as the fact that it had never traded at a price higher than $92.50 per share, *Bell*, 395 A.2d at 740, and a Morgan Stanley study which placed the earnings value of the stock at $120 per share, *Bell*, 413 A.2d at 146-47. The Delaware Supreme Court explained its evaluation of these various factors as follows, *id.* at 141, quoting *Tri-Continental Corp.* v. *Battye*, 74 A.2d 71, 72 (Del. 1950):

> The basic concept of value under the appraisal statute is that the stockholder is entitled to be paid for that which has been taken from him, viz., his proportionate interest in a going concern. * * * In determining what figure represents this true or intrinsic value, the appraiser and the courts must take into consideration all factors and elements which reasonably might enter into the fixing of value. Thus, market value, asset value, dividends, earning prospects, the nature of the enterprise and any other facts which were known or which could be ascertained as of the date of merger and which throw any light on future prospects of the merged corporation are not only pertinent to an inquiry as to the value of the dissenting stockholders'

interest, but must be considered by the agency fixing the value.

It cannot seriously be contended that the criteria articulated by the Delaware Courts are in any way contrary to the due process clauses of the Fifth and Fourteenth Amendments. The real substance of petitioners' position is their disagreement with the results which the Delaware Courts reached in applying these criteria to the specific facts of this particular case. That, however, does not raise any constitutional issue for review by this Court.

5. The Present Case Does Not Present Any Genuine Issue Under *Erie* v. *Tompkins*

Nothing in the judgment of the Court below is in any way inconsistent with the holding of this Court in *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). The Second Circuit recognized, *Loengard* v. *Santa Fe Indus., Inc.*, No. 86-7682 at 3 (2d Cir. Nov. 12, 1987) (Appendix 3a), and all parties agreed, that petitioners' claim for alleged breach of fiduciary duty was governed by Delaware law. The Court of Appeals also noted (*id.*) that the courts in *Green* v. *Santa Fe Indus., Inc.*, 576 F. Supp. 269 (S.D.N.Y. 1983), *aff'd mem.*, 742 F.2d 1434 (2d Cir.), *cert. denied*, 469 U.S. 917 (1984), and *Green & Borg* v. *Santa Fe Indus., Inc.*, 70 N.Y.2d 244 (1987) "which have considered the identical substantive claims, underlying acts, and factual and legal issues as we consider in this motion and which the District Court considered below, have held that Delaware law affords the plaintiffs no relief." The Second Circuit went on to state: "While we are not required to follow these opinions, we are pursuaded by them that the defendants committed no breach of fiduciary duty under Delaware law", *Loengard*, No. 86-7682 at 3.

Thus, the real substance of petitioners' argument is, not that the Second Circuit refused to apply Delaware law, but that it did so in what petitioners believed to be an erroneous way. Even assuming *arguendo* that petitioners' contention had any substance on this point, there would still be no "special and important reasons" why this Court should exercise its "judicial

discretion" under Rule 17 to review such a question on certiorari. Petitioners have simply disregarded this Court's consistent teaching that certiorari is not a device for the routine correction of alleged errors in lower court decisions, and particularly not as to alleged errors in interpretation of state law. *See, e.g., Butner* v. *United States*, 440 U.S. 48, 57-58 (1979); *The Tungus* v. *Skovgaard*, 358 U.S. 588, 596-97 (1959); *General Box Co.* v. *United States*, 351 U.S. 159, 165 (1956); R. Stern & E. Gressman, *Supreme Court Practice* §§ 4.10, 4.18, pp. 283, 297-98 (5th ed. 1978).

In any event, the decision below was clearly correct on the merits. Petitioners, while apparently not disputing that statutory appraisal is generally the exclusive remedy for alleged undervaluation in a Delaware short-form merger, argue (Petition, p. 11) that the Delaware Supreme Court would have made an exception in the present case on grounds of "gross and palpable overreaching" or "unfair dealings." That position, however, is untenable in light of the Delaware Supreme Court's own comments in its 1980 decision concerning the very merger here involved. With reference to the Morgan Stanley study on which the merger price was based, the Court stated: "we are satisfied that the Morgan Stanley appraisal is the product of an orderly and logical deductive process in accordance with approved methodology properly accepted by the Appraiser and the Vice-Chancellor." *Bell*, 413 A.2d at 147. The Court in *Green* v. *Santa Fe Indus., Inc.*, 576 F. Supp. at 271 n.1, quoted this language, and noted that "the Delaware Supreme Court did not suggest that any fraud or overreaching occurred in connection with the 1974 short-form merger." The opinion of the New York Court of Appeals in *Green & Borg* v. *Santa Fe Indus., Inc.*, 70 N.Y.2d 244 (1987), also cited by the Second Circuit below, likewise quoted this language from *Bell*, and concluded that "there is no such demonstration of 'fraud or blatant overreaching' as would bring the case within the exception to the general rule making the statutory appraisal proceeding plaintiffs' exclusive remedy." (*Id.* at 259).

Alternatively, petitioners argue (Petition, p. 11 n.4) that they fall within the "grandfather clause" of *Weinberger* v. *UOP, Inc.*, 457 A.2d 701 (Del. 1983). This argument, also, was considered and rejected in the *Green* and *Green & Borg* decisions which the Second Circuit cited. The courts there noted that the "grandfather clause" had been intended to protect stockholders who had relied on a series of Delaware Supreme Court decisions, beginning in 1977, which briefly established an exception to the exclusivity of the appraisal remedy with respect to mergers lacking an independent "business purpose." These "business purpose" decisions—*Singer* v. *Magnavox Co.*, 380 A.2d 969 (Del. 1977), *Tanzer* v. *International Gen. Indus. Inc.*, 379 A.2d 1121 (Del. 1977), and *Roland Int'l Corp.* v. *Najjar*, 407 A.2d 1032 (Del. 1979)—were expressly overruled by the Delaware Supreme Court in its *Weinberger* decision on February 1, 1983. In holding that the "grandfather clause" in *Weinberger* was not intended to apply to the 1974 Kirby merger, the New York Court of Appeals stated in *Green & Borg*, 70 N.Y.2d at 258:

> Plaintiffs, construing the language of the *Weinberger* opinion literally, contend that they should have the benefit of the *Singer-Tanzer-Roland* rule because the merger was prior to the February 1, 1983 cut-off date. We do not believe the Delaware Supreme Court had such intention. We interpret the savings clause language in the *Weinberger* opinion as intended only to benefit those plaintiffs "who abjured an appraisal" in reliance on the so-called "business purpose" rule first adopted by *Singer* in 1977. Because the rule was not in existence at the time of the Kirby-Forest Products merger, plaintiffs could not have given up their appraisal rights in reliance on that rule. We agree with Judge Duffy's reasoning that: "[a]lthough the *Weinberger* court, appeared to limit the reach of its holding to all mergers effected before 1983, the policy considerations behind the court's decision to allow certain plaintiffs to continue to seek remedies other than appraisal would not be promoted by a blind application of the court's provision for retroactive relief. Further, plaintiffs

would reap a windfall that the Delaware Supreme Court could not have intended." (576 F. Supp. 269, 271, *supra*).

Further, even assuming *arguendo* that all the courts which considered the matter erred on this point, no issue would be presented which would merit review on certiorari. The applicability of the *Weinberger* "grandfather clause" to this peculiar set of facts hardly presents any "special and important reasons" for review, within the meaning of Rule 17. " 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). The purpose of this Court's certiorari jurisdiction is not to resolve questions of such "isolated significance" that they are unlikely to find any future application. *Id.* at 76.

6. Petitioners' Conscious Decision to Forego the Delaware Appraisal Remedy Raises No Issue for Review

Finally, petitioners urge (Petition, pp. 13-14) that the "end result" of the decision below is "intolerable," because they are left "without remedy." But, as this Court pointed out more than a decade ago, Delaware law did provide the minority stockholders of Kirby with a remedy. *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. at 465-66. Petitioners' voluntary decision to forego that remedy presents no genuine issue for review, under the due process clause or otherwise.

7. Appropriate Sanctions Should be Entered for the Filing of a Frivolous Petition

Plaintiffs sought and obtained an extension of their time to file a petition for certiorari on the basis of a representation that they had retained new counsel, who needed time to study the record; yet no new counsel appeared on the petition, which was in fact filed by the same attorney who has represented petitioners and their associated plaintiffs for the past fourteen years. The petition itself seeks to invoke the certiorari jurisdiction of this Court on the basis of a patently contrived constitutional issue, which was never raised in the courts below. It is, in fact,

clear that the decision below turned entirely on issues of state law, and that even these state law issues were extremely narrow and fact-specific. Finally, petitioners have repeated a characterization of the proceedings below which the Second Circuit had already condemned as "incorrect and disingenuous." *Loengard*, No. 86-7682 at 3. In short, there simply was no good faith basis for filing the instant petition, and appropriate sanctions should be imposed under Rule 49.2 of the Rules of this Court.

CONCLUSION

For all the reasons assigned, the petition should be denied, and appropriate damages should be awarded against petitioners pursuant to Rule 49.2 of the Rules of this Court.

Dated: April 6, 1988

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies that on the ____ day of April, 1988, he caused the annexed Brief in Opposition to Petition for Writ of Certiorari to be served on Sidney Bender, Esq., Attorney for Petitioners, by causing three copies of the same to be sent to said attorney in a properly addressed, first class post-paid envelope, at 1205 Franklin Avenue, Garden City, New York 11530, the address designated by said attorney for service of papers. There are no other parties required to be served with the annexed document.

Dated: New York, New York
April ____, 1988

Guy C. Quinlan